Re Hong Kim Sime, ex p Malayan Banking Bhd

HIGH COURT (TAWAU) — BANKRUPTCY PETITION NO 140 OF 1993
IAN CHIN J
11 JULY 1994

Bankruptcy *— Petition — Affidavit verifying petition sworn by justice of the peace — Whether irregular, defective and ex facie void ab initio — Whether justice of the peace considered a magistrate to administer oaths — Position in Sabah — Bankruptcy Act 1967 s 128(a) — Justices of the Peace Ordinance 1961 s 4(1) — Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 reg 2*

Bankruptcy *— Petition and notice — Bankruptcy notice and creditors' petition bore different execution numbers — Fault of the court — Whether prejudicial to any party*

Words and Phrases *— Magistrate — Interpretation Acts 1948 and 1967*

A bankruptcy petition taken out by the judgement creditor was opposed by the judgment debtor on two grounds: (1) that the affidavit verifying the petition was sworn by a justice of the peace ('JP') and was therefore irregular, defective and ex facie void ab initio thereby rendering the creditor's petition a nullity ('the first objection'); and (2) that in the court records, there was a bankrupty notice without a corresponding creditors' petition as the bankruptcy notice and the creditors' petition bear different execution numbers which do not match emanating from the same judgment ('the second objection').

Held, dismissing the judgment debtor's opposition to the petition:

(1) Section 4(1) of the Justices of the Peace Ordinance 1961 and a specific provision of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 made it clear that a JP is to take affidavit as if he were a magistrate of the second class. Therefore, as the word 'magistrate' in s 128(a) of the Bankruptcy Act 1967 includes a second class magistrate which in turn includes a JP, a JP of Sabah can take affidavits for the purposes of bankruptcy proceedings.

(2) A bankruptcy petition is grounded not on the absence or presence of numbers or similar numbers but on an act of bankruptcy which, in this case, was clearly stated in the petition and which petition clearly adverted to the bankruptcy notice even though the petition and the notice bore different numbers. The practice of assigning separate numbers for a bankruptcy notice and thereafter for a bankruptcy petition founded on the said bankruptcy notice was the fault of the court. Therefore, this was a case where non-compliance with the rule did not bring about any prejudice to any party.

[**Bahasa Malaysia summary**

Suatu petisyen kebankrapan telah dikeluarkan oleh pemiutang penghakiman yang telah ditentang oleh penghutang penghakiman atas dua alasan: (1) bahawa afidavit yang menentusahkan petisyen itu telah disumpah oleh seorang jaksa pendamai ('JP') dan oleh itu adalah di luar aturan, cacat dan ex facie tidak sah ab initio dan menjadikan petisyen pemiutang batal ('bantahan pertama'); dan (2) bahawa di dalam rekod mahkamah, terdapat suatu notis kebankrapan tanpa petisyen pemiutang yang sepadan kerana notis kebankrapan dan petisyen pemiutang mengandungi nombor penyempurnaan yang tidak serupa yang berbangkit daripada penghakiman yang sama ('bantahan yang kedua').

Diputuskan, menolak bantahan pemiutang penghakiman terhadap petisyen itu:

(1) Seksyen 4(1) Ordinan Jaksa Pendamai 1961 and suatu peruntukan spesifik di dalam 'Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990' memperlihatkan dengan jelas bahawa seorang JP boleh bersumpah atas suatu afidavit sepertimana beliau merupakan seorang majistret kelas kedua. Dengan itu, oleh kerana perkataan 'majistret' di dalam s 128(a) Akta Kebankrapan 1967 termasuk seorang majistret kelas kedua yang juga termasuk seorang JP, seorang JP di Sabah boleh bersumpah atas suatu afidavit bagi tujuan prosiding kebankrapan.

(2) Suatu petisyen kebankrapan tidak berasaskan ketiadaan atau kewujudan nombor atau nombor yang serupa tetapi atas suatu perbuatan kebankrapan yang, di dalam kes ini, telah dinyatakan dengan jelas di dalam petisyen itu dan petisyen itu dengan jelas telah merujuk kepada notis kebankrapan walaupun petisyen itu dan notis itu mengandungi nombor yang berlainan. Prosedur memberi nombor yang berlainan untuk suatu notis kebankrapan dan selepas itu untuk suatu petisyen kebankrapan yang diasaskan atas notis kebankrapan itu adalah merupakan kesilapan mahkamah. Oleh itu, ini merupakan suatu kes di mana ketidakpatuhan dengan kaedah itu tidak memudaratkan sebarang pihak.]

Legislation referred to

Bankruptcy Act 1967 s 128, Sch C r 30
Courts of Judicature Act 1964 s 11
Interpretation Acts 1948 and 1967
Justices of the Peace Ordinance 1961 s 4(1)
Subordinate Courts Act 1948 s 99
Bankruptcy Rules 1969 r 9(3)
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990

PK Lim (*PK Lim & Co*) for the debtors.
Samson Chin (*Hiew & Chin*) for the creditors.

Cur Adv Vult

Ian Chin J: The petition herein is opposed by the judgment debtor on two technical grounds, which are reduced into writing by Mr PK Lim, counsel for the judgment debtor, and which I reproduce verbatim, viz:

> (a) that the said affidavit verifying the petition is irregular, defective and ex facie void ab initio thereby rendering the creditor's petition a nullity and/or not maintainable in law as not being supported by a valid affidavit (hereinafter referred to as 'the first objection'); and
>
> (b) that on the court records, there exists a bankruptcy notice *without* a corresponding creditors' petition as the bankruptcy notice and the creditors' petition bear different execution numbers which do not match emanating from the same judgment (hereinafter referred to as 'the second objection').

The same objection against two other petitions, Nos T–29–148–93 and T–29–149–93, were, at the behest of the same counsel for the parties, heard together. Arguments were heard on 4 July 1994.

Affidavit before a justice of the peace ('JP')

Mr PK Lim argued that a JP is not legally competent under s 128 of the Bankruptcy Act 1967 ('the Act'), to attest the affidavit of truth of statement in petition because, argued Mr PK Lim, a JP is neither a 'person authorized to administer oaths in the High Court' nor 'a Magistrate' as required by s 128 of the Act. For ease of reference the said section is reproduced here, viz:

> Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy court if it is sworn —
>
> (a) in Malaysia or in the Republic of Singapore before any person authorized to administer oaths in the High Court or any Magistrate; or
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> (b) in England before any person authorized to administer oaths in Her Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court; or
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> (c) in Scotland or in Northern Ireland before a Judge, Ordinary Magistrate or Justice of the Peace; or
>
> (d) in any other place before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place who is certified to be a Magistrate or Justice of the Peace or qualified as aforesaid by a Consul or person performing consular functions on behalf of the Government of Malaysia or by a notary public.

The provision just referred to is clear and unambiguous and an affidavit, sworn in Malaysia or Singapore, must be affirmed or sworn before a

person authorized to administer oaths in the High Court or before a magistrate. The people who are authorized to administer oaths in the High Court are the registrars of the High Court, including deputies and assistants, and this is provided for in s 11 of the Courts of Judicature Act 1964; a JP is obviously not one of them. The specific and exhaustive categorization, in s 128 of the Act, of the persons qualified to take affidavits means that only those specified persons and no other can take affidavit for use in bankruptcy proceedings unless rules made under the Act otherwise provide. A JP is specifically allowed to take affidavit if the affidavit is to be taken outside Malaysia or outside Singapore (see s 128(d) of the Act). Section 128 of the Act, in specifically allowing for a JP outside of Malaysia and Singapore to take an affidavit and in omitting a JP from the category of persons allowed to take affidavit in Malaysia and Singapore, makes it clear that a JP is not a person authorized to administer oaths in the High Court unless a JP can come within the definition of 'magistrate'. The only exception to the authorized category is found in r 30 of Sch C of the Act which provides that: 'For the purpose of any of his duties in relation to proofs the Official Assignee may administer oaths and take affidavits.'

The just cited rule allows the Official Assignee to take affidavit and is thus an exception, in fact, the only exception I can find, to the provision in s 128(a) of the Act which reinforces my conclusion that the wordings of s 128 of the Act are clear enough and, in so far as the taking of affidavit in Malaysia or Singapore is concerned, do not admit a JP to be a person authorized to administer oaths in the High Court. Thus far, I have only considered the question of whether a JP is a person authorized to administer oaths in the High Court, which I find in the negative. Mr Samson Chin, counsel for the creditors, referred to various enactments, which I will now advert to, and argued that a JP is allowed to take affidavit for bankruptcy proceedings, presumably, as he did not say so in so many words, because a JP can be considered a magistrate within the meaning of s 128(a) of the Act. He cited s 4(1) of the Justices of the Peace Ordinance 1961, which says that:

> Every justice of the peace shall be authorised and is hereby required to administer oaths and affirmations, take and receive statutory declarations and attest signatures under any written law or when otherwise required to do so as though such justice of the peace were a magistrate.

He argued that that section allows a JP to take affidavit for the purposes of the bankruptcy proceedings. It was also argued by Mr Samson Chin that s 99(2) of the Subordinate Courts Act 1948, and the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, have the result of enabling a JP to take affidavit for the purposes of bankruptcy proceedings, both of which are reproduced here:

> Section 99(2) Subordinate Courts Act 1948 states:
>
> Justices of the Peace in Sabah shall have and shall exercise and perform such powers and duties as may be conferred or imposed upon them by any written law. They shall also have such other powers and duties as the

A Minister may by regulations confer or impose upon them and the Minister may confer or impose the said powers and duties upon all or any of the Justices of the Peace.

The Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 states:

B 2 Every Justice of the Peace shall be authorised and is required —

(a) to administer oaths and affirmations;

(b) to make and receive statutory declarations; and

(c) to attest signatures,

C under any written law or when otherwise required to do so as though such Justice of the Peace were a Second Class Magistrate.

The issue, therefore, is whether a JP can be considered a 'magistrate', authorized to administer oaths within the meaning of s 128(a) of the Act. The word 'magistrate' is not defined by the Act. The Interpretation Acts 1948 and 1967, defines the word to mean 'a magistrate appointed under D any written law providing for the appointment of magistrates'. Magistrates, both first and second class, are appointed under the provisions of the Subordinate Courts Act 1948. In West Malaysia, a JP has the power to exercise within the State for which he is appointed, such powers not exceeding the powers of a second class magistrate as may be conferred E upon them by any written law. (See s 99(1) of the Subordinate Courts Act 1948.) A JP of Sabah is governed by separate legislation, which are the Justices of the Peace Ordinance 1961, s 99(2) of the Subordinate Courts Act 1948 and the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, all of which I have already quoted. Concerning F myself with the position of a JP of Sabah, I am of the view that the deeming provision of s 4(1) of the Justices of the Peace Ordinance 1961 and the specific provision of the said Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, make it clear that a JP is to take affidavit as if he is a magistrate of the second class. Since a JP is clothed with such G power as if he is a second class magistrate, he could equally be regarded as having been appointed a second class magistrate. The Subordinate Courts Act 1948, contains provisions governing the appointment of a second class magistrate and the word 'magistrate' has been used there generically and therefore admits of magistrates of both classes. Since the Act was silent as to the meaning of the word 'magistrate', resort has to be had to the H Interpretation Acts 1948 and 1967 and the later Acts advert to the Subordinate Courts Ordinance 1948, for its definition of magistrate and hence the word 'magistrate' in s 128(a) of the Act includes a second class magistrate and, for the reasons I have stated, this in turn includes a JP since a JP has been deemed to be a second class magistrate. I am, therefore, I of the view that a JP of Sabah can take affidavits for the purposes of bankruptcy proceedings because a JP is to be regarded as a magistrate for the purposes of s 128(a) of the Act. I will now turn to the second objection.

Proceedings' numbers

The proceedings herein are intituled in the following manner:

In Bankruptcy Notice No T (29) 39 OF 1993
Bankruptcy Petition No T (29) 140 OF 1993

Re: Hong Kim Sime (NRIC H0087713)
— The judgment debtor

Ex parte: Malayan Banking Bhd
— The petitioning creditors

Mr PK Lim referred the court to r 9(3) of the Bankruptcy Rules 1969, which provides for all proceedings of the same matter to bear the same number, and argued that there is a breach of the statutory requirement and that this had resulted in 'a hanging petition not supported by a bankruptcy notice bearing the same distinctive number as the creditors' petition'. He argued that the petition herein is a nullity. To that, I say we must not lose sight of the law that a bankruptcy petition is grounded not on the absence or presence of numbers or similar numbers but on an act of bankruptcy which, in this case, is clearly stated in the petition and which petition clearly adverts to the bankruptcy notice even though the petition and the notice bear different numbers. The practice of assigning separate numbers for a bankruptcy notice and thereafter for a bankruptcy petition founded on the said bankruptcy notice was the fault of the court. Given what I have said, this is surely a case where non-compliance with the rule did not bring about any prejudice to any party. The petition cannot be set aside on this ground. The debtor fails in his objections.

The opposition of the debtor to the petition is dismissed with costs to be taxed. Similarly, the oppositions of the debtors of the said two other petitions are also dismissed with costs to be taxed.

Order accordingly.

Reported by Jeanne Tan